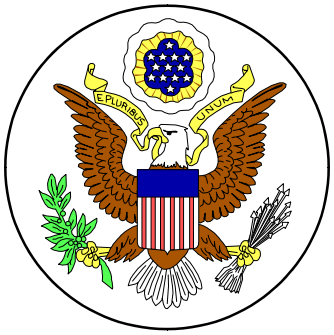
JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF
THE HONORABLE WM. TERRELL HODGES

JUDGE, UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA



FOR THE
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARING ON
THE MULTIDISTRICT LITIGATION RESTORATION ACT

June 29, 2006

Administrative Office of the U.S. Courts, Office of Legislative Affairs
Thurgood Marshall Federal Judiciary Building, Washington, DC 20544, 202-502-1700

SUMMARY OF STATEMENT OF JUDGE WM. TERRELL HODGES

ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES
June 29, 2006

The Judicial Conference of the United States, the policy-making body for the federal judiciary, urges Congress to enact the "Multidistrict Litigation Restoration Act." Currently, the multidistrict litigation process established in 28 U.S.C. § 1407 allows civil cases pending in multiple judicial districts involving common questions of fact to be centralized for coordinated or consolidated pretrial proceedings before one "transferee" judge by the Judicial Panel on Multidistrict Litigation (Judicial Panel). For thirty years following the creation of this beneficial process, transferee judges used the venue statute to transfer the cases to their court or another district for trial when appropriate. In 1998, however, the Supreme Court held in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach* that the present language of section 1407 required remand of such cases upon completion of pretrial procedures and stated that the resolution of the issue belonged on the floor of Congress. In response, Congress has pursued the Multidistrict Litigation Restoration Act to restore this valuable tool long-used effectively by federal transferee judges.

There are essentially three reasons why this legislation is needed to authorize a transferee judge to retain for trial some or all of the cases in the interest of justice and for the convenience of the parties and witnesses. First, the bill will facilitate settlements in these complex, multistate cases. The anticipation and possible use of a trial transfer has historically proven to be a strong inducement to spawn global or individual settlements at all stages of the proceedings. Second, it will reduce the needless waste that stems from litigating these cases in multiple jurisdictions, thereby conserving scarce judicial resources and reducing litigants' expenses. Moreover, the transferee judge, by supervising the day-to-day pretrial proceedings, becomes intimately familiar with the dynamics of those cases including the underlying facts, the applicable laws, the possible settlement values, and the reasonable amount of the attorneys' fees that might ultimately be sought by prevailing counsel. Third, the legislation will directly benefit litigants who will be better served by improving efficiency in the handling of these cases. Over 228,000 cases have been centralized involving millions of claims altogether. Parties should not be subjected to the uncertainties, delays, and expense created by unnecessary duplication of litigation or subjected to possible inconsistent adjudications.

Therefore, the Judicial Conference urges prompt passage of this vital legislation to enhance and promote efficiencies within the operation of the multidistrict litigation process.

STATEMENT OF JUDGE WM. TERRELL HODGES
ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES
June 29, 2006

Mr. Chairman and Members of the Subcommittee, my name is Wm. Terrell Hodges. I am a United States Senior District Judge in the Middle District of Florida and Chairman of the United States Judicial Panel on Multidistrict Litigation (Judicial Panel), which is composed of seven United States circuit and district judges from throughout the country. From 1996 to 1999, I was Chairman of the Executive Committee of the Judicial Conference of the United States (Judicial Conference).

I have been asked to testify today on behalf of the Judicial Conference regarding the "Multidistrict Litigation Restoration Act," which has already passed the House of Representatives this Congress as H.R. 1038. The Judicial Conference strongly supports this legislation and greatly appreciates your holding this hearing. I would ask that my statement be included in the record.

This legislation will restore the ability of a transferee judge to retain a case for trial or to transfer it to another district in the interest of justice and for the convenience of the parties and witnesses. It is needed for three primary reasons. First, the legislation will facilitate settlements in complex, multistate cases. Second, it will reduce the needless waste that stems from litigating these cases in multiple jurisdictions, thereby conserving scarce judicial resources and reducing litigants' expenses. Third, the legislation will directly benefit litigants who will be better served by improving efficiency in the handling of these cases.

The Supreme Court's Decision in Lexecon and the Judiciary's Response

In 1998, the Supreme Court ended a thirty-year practice whereby cases centralized by the Judicial Panel could be transferred by the transferee judge, pursuant to the venue statute

(28 U.S.C. § 1404(a)) for trial in the transferee or other district.[1] This decision was *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). The Court held that section 1407 of the Multidistrict Litigation Act[2] explicitly required the Judicial Panel to remand for trial in their original districts all cases that had not been terminated in the transferee district.[3] In its opinion, the Court noted that Congress is the proper venue for determining whether the practice of self-assignment under these conditions should continue. Thus, the Supreme Court's opinion in *Lexecon* was one of statutory interpretation – not one based on a constitutional adjudication.

The Judicial Conference responded promptly by adopting a position in September 1998 to "support legislation to amend the multidistrict litigation transfer provision, 28 U.S.C. § 1407, to provide that a district court conducting pretrial proceedings pursuant to that section could assign a transferred case for trial proceedings to itself or another district court in the interest of justice and for the convenience of parties and witnesses." *Report of the Proceedings of the Judicial Conference of the United States*, p. 76 (Sept. 1998).[4] The Judicial Panel also took the

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[1]This practice had been embraced in case law, *see, e.g.*, Pfizer, Inc. v. Lord, 447 F.2d 122, 124-25 (2d Cir. 1971), and in former Rule 14 of the Judicial Panel.

[2]The Multidistrict Litigation Act, 28 U.S.C. § 1407(a)-(g), was enacted in 1968 by Pub. L. No. 90-296, 82 Stat. 109.

[3]Among those filing amicus briefs in the *Lexecon* case that were submitted in support of the self-transfer authority were leading corporate and investment banking firms, trade associations representing many of the nation's life and property and casualty insurers, the trade association of the country's aerospace manufacturers, a major pharmaceutical company, and a significant asbestos litigation defendant. Plaintiff Lexecon Inc. itself did not object to self-transfer in the main group of cases (arising from failure of Lincoln Savings & Loan Association led by Charles Keating) from which *Lexecon* peripherally sprang. The defendants in *Lexecon*, who included lawyers and law firms that have typically represented plaintiffs in complex litigation, were the respondents in the Supreme Court and strongly supported self-transfer.

[4]This position was recommended to the Judicial Conference by its Committee on Federal-State Jurisdiction, after that Committee solicited the views of the Judicial Panel and of the Judicial Conference Committee on Court Administration and Case Management.

same view, supporting this position.

Beginning with the 106th Congress, the Administrative Office of the U.S. Courts transmitted proposed legislation on behalf of the Judicial Conference that would implement its position and solve the problem created by the *Lexecon* decision. Since that time, the Judicial Conference, as well as the Judicial Panel, has written repeatedly to Congress to urge enactment of this legislation. Also, on June 16, 1999, Judge John F. Nangle, former Chairman of the Judicial Panel, testified in support of the *Lexecon* legislation (H.R. 2112, 106th Cong.) before the House Judiciary Committee's Subcommittee on Courts and Intellectual Property. During the present Congress, the House passed the "Multidistrict Litigation Restoration Act of 2005" on April 19, 2005, as H.R. 1038 under suspension of the rules. This bill has been referred to the Senate.

In addition, the U.S. Chamber of Commerce has previously expressed its support for the Multidistrict Litigation Restoration Act (H.R. 1038, 109th Cong.). In its letter to Members of the House dated April 19, 2005, that organization stated that enactment of the legislation will "improve the federal multidistrict litigation process" and "will help conserve finite judicial resources, save costs for plaintiffs and defendants, and reduce inconsistencies in the law."

Description of the Multidistrict Litigation Restoration Act and Prior Congressional Action

Section 2 of H.R. 1038, which bill was passed by the House of Representatives in April 2005, would amend 28 U.S.C. § 1407, the multidistrict litigation statute, by adding a new subsection (i) to allow a judge with a transferred case to retain it for trial or to transfer it to another district in the interest of justice and for the convenience of the parties and witnesses. The new subsection would also provide that any action transferred for trial must be remanded by

the Judicial Panel for the determination of compensatory damages to the district court from which it was transferred, unless the transferee court finds for the convenience of the parties and witnesses and in the interests of justice that the action should be retained for the determination of compensatory damages.

The same language in section 2 above also passed the House of Representatives in the previous three Congresses (106th - 108th) in bipartisan fashion. In addition, the Senate passed similar *Lexecon* legislation by unanimous consent during the 106th Congress (by passing S. 1748 and then substituting its text into H.R. 2112, which it then passed). Section 2 of S. 1748 is virtually identical to section 2 of H.R. 1038 as passed by the House this Congress.[5]

Section 3 of H.R. 1038 would amend the "Multiparty, Multiforum Trial Jurisdiction Act of 2002," which was enacted as section 11020 of the "21st Century Department of Justice Appropriations Authorization Act" (Pub. L. No. 107-273, 116 Stat. 1758) (*codified at* 28 U.S.C. §§ 1369, 1391, 1441, 1697, and 1785). Section 1369 of that law granted district courts original jurisdiction over any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 people have died in the accident at a discrete location. When the Multiparty, Multiforum law was enacted, it did not include statutory language giving district courts authority to retain cases for the determination of liability and punitive damages, as originally intended.

Section 3 of H.R. 1038 would address this shortcoming by adding a new subsection 1407(j) to title 28 (which is already referred to in 28 U.S.C. § 1441(e)(2)) specifically

[5]S. 1748 (106th Cong.) was sponsored by Senators Hatch, Leahy, Grassley, Kohl, Torricelli, and Schumer.

authorizing a transferee court hearing an action based on section 1369 (and transferred pursuant to section 1407) to retain such actions for the determination of liability and punitive damages. Also, new subsection (j) would provide that if the district court retains the case to determine liability, the case must be remanded to the original district court or state court for the determination of compensatory damages, unless the court finds, for the convenience of parties and witnesses and in the interest of justice, that the action should be retained for that determination as well. Moreover, subsection (j) would track the existing Multiparty, Multiforum law to describe how certain appeals and procedures would be handled, including using language identical to that in present law specifying that a remand decision for the determination of damages shall not be reviewable by appeal or otherwise. *See* 28 U.S.C. § 1441(e)(4).

In addition to the present Congress, section 3 has previously been passed by the House of Representatives in bipartisan fashion. More specifically, such trial-transfer authority was included in the prior legislative versions of the Multiparty, Multiforum law when it was passed by the House in the 101st, 102nd, 105th, 106th, 107th, and 108th Congresses.

Three Principal Reasons for the Lexecon Legislation

The Judicial Conference believes that this legislation constitutes a vital improvement of the statutory mechanism Congress established for the consideration of multidistrict litigation cases. There are essentially three principal reasons why enactment of it is needed today. First, a judge's authority to try the case is a critical component of the judge's ability to facilitate settlement. The anticipation and possible use of a trial transfer has historically proven to be a strong inducement to spawn global or individual settlements at all stages of the proceedings. Settlements can occur either during pretrial, on the eve of trial, during trial, after a consolidated

liability trial, or after some selected, sample cases have proceeded to trial on the issues of damages (which are known as "bellwether" trials). Also, a firm trial date alone becomes an effective means to promote settlement. Even if the transferee judge does not exercise the self-transfer authority, simply the parties' perception that the transferee judge might order self-transfer has, in the past, contributed significantly to the disposition of many cases.

Any interference with this dynamic is no small matter. As of September 30, 2005, over 228,000 cases had been centralized under section 1407 since 1968. Many of these cases have involved multiple plaintiffs and defendants, with correlating claims, counterclaims, cross-claims, third-party claims, and intervenors, totaling millions of claims altogether.

Moreover, if plaintiffs or defendants perceive a tactical advantage by waiting for a remand to transferor courts after pretrial proceedings have concluded, fruitful settlement discussions will be delayed if not undermined altogether. The whole process thus becomes prolonged and delayed, with increased expenses and wasted resources for the judiciary, parties, witnesses, and attorneys. There is also the possibility of inconsistent adjudications. For example, a set trial date in cases filed in her district promoted class action settlements in 2005 in MDL (multidistrict litigation)-1487 – *In re WorldCom, Inc., Securities & "ERISA" Litigation* before Judge Denise Cote in the Southern District of New York.

Second, waste is avoided if trial-transfer authority exists. The transferee judge becomes intimately familiar with all aspects of the action as a result of supervising the day-to-day pretrial proceedings. The judge knows the underlying facts, learns the applicable laws, recognizes the lawyers' strategies and tactics, and gains a sense of the values of the claims and attorneys' fees. If some or all of the many cases that have been centralized are remanded to the various judges

from originating districts for trial, then those judges are totally unfamiliar with the action. Many issues may be raised again in preparation for trial, and the learning curve can be steep. Moreover, this results in duplicate litigation in multiple courts. Thus, the status quo leads to a waste of the judiciary's time and resources, as well as of the litigants. Although some transferee judges have gone to great lengths in an effort to avoid some of this waste and to bring resolution more promptly to these cases, as described below, they have not proven to be solutions to the *Lexecon* problem.

The third reason why this legislation still needs to be enacted is that litigants are better served by improving efficiency. As mentioned previously, the volume of litigation in this process is enormous, with over 228,000 cases having been centralized under section 1407 by the end of September 2005. One centralized action may involve multiple plaintiffs and defendants. Plaintiffs should have similar claims decided in similar fashion and should receive prompt compensation for their damages with a minimum of costs. Defendants should also be able to minimize their litigation expenses and reduce their exposure to possible inconsistent adjudication.

In the past, the transferee judge and the parties often used a consolidated trial in the transferee district for determining the common liability issues, such as whether a product is defective or causes a specific disease, whether any warning about potential harmful effects of a product was adequately disclosed, whether securities were fraudulently marketed, or whether defendants conspired to engage in unlawful conduct. Such a trial offers obvious efficiencies in resolving shared questions in one forum instead of multiple forums, while leaving individual issues such as damages to be tried later in the transferee district or transferor districts, as may

become appropriate.

Operation of Trial Transfer

A transferee judge, as the judicial expert in a particular multidistrict litigation supervising the centralized pretrial proceedings, should again have the option and flexibility to try all or key parts of that litigation at his or her own discretion, with the parties' input. The criteria for trial self-transfer in the present legislation are taken from provisions found in 28 U.S.C. § 1404, which allow a court to transfer a civil action, including trial, in the interest of justice and for the convenience of the parties and witnesses. This language is time-tested and is broad enough to be applied wisely and judiciously on a case-by-case basis after the transferee judge takes into account the nuances of the litigation and the parties' views. Judges are routinely called upon in the normal course of adjudicating any case to factor in countless evolving constitutional, statutory, procedural, and case law considerations. Litigants assuredly will bring these factors to the attention of the court from the vantage point of each litigant's tactics, interests, and factual situation.

It is important to emphasize that the Multidistrict Litigation Restoration Act would not require that some or all of the centralized cases be retained in the transferee district for trial; rather, it would simply permit the transferee judge to identify a case or cases that should logically be retained. Consolidated trials on liability issues may resolve shared questions in one forum instead of multiple forums, or a particular case or cases may be suitable to serve as bellwether trials for purposes of a global settlement.

Currently, for example, bellwether trials of cases with various exposure scenarios have been taking place or are planned in MDL-1657 – *In re Vioxx Marketing, Sales Practices and*

Products Liability Litigation before transferee judge Judge Eldon E. Fallon of the Eastern District of Louisiana. Unless Judge Fallon can secure intra- or intercircuit assignments authorizing him to sit in other districts, he will only be able to conduct such trials in actions originally filed in or transferred back to the transferee district. Surely he and the parties should be able to thoroughly consider the venue options for him to conduct bellwether trials, both in his own district and elsewhere. He should not be forced to follow a case to its transferor district or to secure remand of the case from the Judicial Panel and then rely on a decision by a judge in the original district, who would be unfamiliar with the dynamics of the overall litigation, to transfer the case back to Judge Fallon's district under section 1404.

Role of the Judicial Panel

Section 1407(a) of title 28 currently authorizes the Judicial Panel to transfer related cases, pending in multiple federal judicial districts, to a single district for coordinated or consolidated pretrial proceedings, upon its determination that centralizing those cases will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the cases. The process typically begins when a motion is filed under 1407 by one or more parties in one or more of the cases, asking that the cases be transferred to a single judge in a given district for pretrial management. An MDL docket is then created and the cases are considered for centralization. The seven federal judges who serve on the Judicial Panel normally conduct oral arguments on such motions for initial centralization when they convene every other month. Then, if the Judicial Panel decides to grant the motion and centralize the cases in a transferee district, related cases might later be filed and added to the docket, which are referred to as “tag-along” cases.

Transfers under section 1407 have the following salutary effects: (1) avoiding duplication of discovery and other pretrial proceedings; (2) preventing inconsistent pretrial rulings; and (3) conserving the resources of the parties, their counsel, and the judiciary. The transferee judge, accordingly, becomes the federal judicial expert regarding the cases as a result of supervising the day-to-day pretrial proceedings, thereby becoming intimately familiar with the entire docket's dynamics and nuances. As of mid June 2006, approximately 191 transferee judges were supervising about 256 groups of multidistrict cases, with each group composed of a various number of cases (some totaling in the hundreds, thousands, or tens of thousands) in varying stages of development.

Multidistrict litigation entails significant national legal matters, such as asbestos, silicone gel breast implants, diet drugs like fen-phen, hemophiliac blood products, the Vioxx medication, heart valves, tires, and orthopedic bone screw products liability litigation. It also includes all major air crashes, such as the ones relating to the September 11 terrorist attacks, TWA Flight 800 off Long Island, Secretary of Commerce Ron Brown's death in Croatia, ValuJet in the Florida Everglades, and Swissair near Nova Scotia.

Other examples of types of centralized cases include the sales practices of several insurance companies, billing by health care providers and phone companies, and antitrust allegations in the markets of automobile imports, brand-name prescription drugs, compact discs, computer operating systems, contact lenses, corn sweeteners, electricity, natural gas, vitamins, and oil. Also centralized have been issues pertaining to securities laws or pension fund claims involving Enron, Global Crossing, Tyco, WorldCom, Adelphia, Merrill Lynch research reports, initial public offerings, mutual funds, and NASDAQ. In addition, claims regarding notices in the

sweepstakes business, various patents, and employment practices have been centralized.

Problems Spawned by the Lexecon Decision

Since *Lexecon*, significant problems have arisen that have hindered the sensible conduct of multidistrict litigation. Transferee judges throughout the United States have voiced their concern about the paramount need to enact this legislation. (See Attachment to this statement for observations of twenty-seven transferee judges.) Those judges have emphasized that giving the transferee judge the ability to determine liability would greatly enhance the chance of settlement and eliminate the possibility of inconsistent determinations throughout the country. They have stressed that time and resources are wasted because of an absence of the trial authority, which was used effectively in the past for decades.

One of the most experienced transferee judges, Senior Judge Robert W. Sweet of the Southern District of New York, summed up the necessity for section 2 of H.R. 1038 as follows: "*Lexecon* has substantially eviscerated the practical purposes of the MDL assignments. After all, pretrial discovery and related proceedings simply set the stage for ultimate resolution. In order to achieve the benefits of consolidation, the assigned judge should have the ability to conduct a consolidated trial on liability. Such a power would greatly enhance the possibility of settlement and, most importantly, eliminate the threat of inconsistent determinations throughout the country."

The alternative recognized in *Lexecon* is for the Judicial Panel to remand the cases to their transferor districts, and then have each original district court decide whether to transfer each case back to the transferee district for trial purposes under section 1404. This, however, is a cumbersome alternative.

For example, in a February 2006 order recommending remand of an action to its originating district, Judge Barbara S. Jones of the Southern District of New York observed that five plaintiffs "have advised the Court that they are seeking remand now in order that they may seek transfer of venue, pursuant to 28 U.S.C. § 1404(a), back to this Court for a consolidated trial. Since this Court has scheduled a consolidated trial of its own cases involving [four] defendants . . . to commence [soon], a remand now may permit such transfer motions to be resolved in time for this Court to consolidate one or more of the out-of-district cases for trial with [those defendants]. Moreover, this Court is familiar with the issues and believes that trial of these cases would be accomplished most efficiently by a single court making determinations as to consolidation, staging, and logistics in a comprehensive manner." MDL-1291 – *In re Omeprazole Patent Litigation*. Interestingly enough, in the same docket in a 2001 order, Judge Jones used virtually identical language to describe a comparable situation except that three defendants, rather than certain plaintiffs, were seeking remand and subsequent section 1404 transfer back to the MDL transferee court for inclusion in a consolidated trial. Clearly this alternative is a repetitive, costly, potentially inconsistent, time consuming, inefficient, and wasteful utilization of judicial and litigants' resources.

Efficiency is also ill-served if the transferee judge is forced to follow a case to its transferor district, rather than order self-transfer. In MDL-1377 – *In re "Dippin-Dots" Patent Litigation*, Judge Thomas W. Thrash, Jr. of the Northern District of Georgia was designated as the transferee judge in a group of patent infringement cases. Some defendants in one of those cases refused to consent to trial before him in that district. Judge Thrash then worked with the Northern District of Texas, to which the case was to be remanded, to obtain an intercircuit

assignment for him to try the case there. After conclusion of the case, Judge Thrash frustratingly observed in a letter from August 2005 as follows: "Needless to say, resolution of this case has been prolonged and involved greater expense to the judiciary (and some hardship for me and my staff) because of my inability to transfer the Northern District of Texas case to myself for trial here in the Northern District of Georgia. On the other hand, it would have been almost criminal to dump this case on a new Northern District of Texas judge for trial. The MDL docket in this district has 427 docket entries. The Northern District of Texas case docket has 931 entries. I hope that this problem will be fixed by Congress soon."

The Class Action Fairness Act of 2005 (Pub. L. No. 109-2) provides additional stimulus to enact the Multidistrict Litigation Restoration Act. Since enactment of the Class Action Fairness Act, significant numbers of related cases have been removed to federal court and then transferred to a single district for coordinated or consolidated pretrial proceedings under section 1407. Transferee judges need the self-trial transfer authority to help get these additional cases resolved efficiently and promptly as well.

Importance of Transferee Judge's Familiarity and Flexible Trial Options

Complex multidistrict cases should be streamlined as much as possible by providing the transferee judge as many options as possible to reasonably expedite trial when the transferee judge, with full input from the parties, deems appropriate. Importantly, self-transfer for trial by a transferee judge is not to a distant, unfamiliar forum, but to one with which the parties and transferee judge have already become well acquainted through the ongoing coordinated or consolidated pretrial proceedings pending before the transferee judge.

Venue is usually not a concern because most key multidistrict defendants conduct

business nationwide. With respect to defendants whose status does implicate traditional venue concerns, the transferee judge can be expected to weigh their interests along with those of all other defendants and the plaintiffs. The result thus could be either a severance of the claims against such defendants and a submission of a remand suggestion to the Judicial Panel, or a transfer of those claims for trial upon a finding by the transferee judge that the interest of justice and the convenience of the parties and witnesses would be served. Again, the parties' ongoing familiarity with the transferee judge may cause many of them to prefer trial before the transferee judge, and they should have the option to seek that disposition.

Likewise, a transferee judge, particularly one sitting by intraciruit or intercircuit assignment to supervise section 1407 proceedings, may find it expeditious to transfer multidistrict cases for trial to another district, such as the one where the transferee judge normally sits. For example, in MDL-979 – *In re Combustion, Inc., Hazardous Substances Cleanup Litigation*, Chief Judge Richard T. Haik was sitting by designation as the transferee judge in the Middle District of Louisiana. He invoked section 1404 to transfer the cases to his home district, the Western District of Louisiana, which he was able to do as this action pre-dated the *Lexecon* decision.

Clearly, transferee judges and parties in centralized multidistrict cases should have flexible options to conduct trials as expeditiously and fairly as possible. In fact, the concept of trial transfer in conjunction with pretrial transfer for multidistrict cases has already been enacted by Congress when it added subsection (h) to section 1407.[6] That subsection authorizes the Judicial Panel to order transfer for trial, as well as for pretrial proceedings, of any action brought

[6]Subsection (h) was added to section 1407 of title 28 in 1976 by Pub. L. No. 94-435, § 303, 90 Stat. 1396.

under section 4C of the Clayton Act (which is the *parens patriae* provision permitting state attorneys general to bring suits on behalf of those injured by violations of the Sherman Antitrust Act).

Section 3 – Trial Transfer Authority in Single-Accident Litigation

While section 2 of H.R. 1038 broadly covers civil litigation in general regardless of subject matter, section 3 provides similar trial-transfer authority in single-accident litigation as was intended by Congress when it enacted the Multiparty, Multiforum Trial Jurisdiction Act of 2002 (Pub. L. No. 107-273). That law codified a reference in 28 U.S.C. § 1441(e)(2) to subsection (j) of 1407, which would have been the trial-transfer subsection. However, that subsection is yet to be enacted.[7] Section 3 of H.R. 1038 would add subsection (j) to 1407.

The Congressional Conference Report on the legislation that included the Multiparty, Multiforum law commented on the self-transfer authority for trial purposes that was intended to be included. It stated that, "[t]he district court in which the cases are consolidated would retain those cases for determination of liability and punitive damages." H.R. Rep. No.107-685, at 201 Pub. L. No. 107-273 (Sept. 25, 2002) (Conf. Rep.). Thus, it is clear that Congress intended to establish the trial-transfer authority for use with those centralized single-accident cases. As the House Judiciary Committee Report of H.R. 1038 stated in describing section 3, "the *Lexecon* fix . . . [in section 3] also functions as a technical correction to the recently-enacted disaster

[7]Section 1441(e)(2), which was enacted in 2002, presently provides as follows: "(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages."

litigation measure." H.R. Rep. No. 109-24, at 4 (March 17, 2005).

The federal judiciary believes that the utility of self-transfer authority is particularly great in the context of mass disaster litigation. In such litigation, all victims (airplane or train passengers, hotel guests, etc.) will ordinarily be situated identically *vis-a-vis* the defendants. This makes the case for consolidation of their actions on common issues especially compelling. There usually are no "individual differences" among the accident victims that would affect or complicate trial of the issue of a defendant's liability or the appropriateness of an award of punitive damages.

Among other things, resolution of such matters in a single transferee court would: (1) ensure that the trial would occur before the transferee judge who, as a result of presiding over day-to-day complex pretrial proceedings, is the one judge most familiar with the factual and legal issues; (2) enable plaintiffs' counsel to coordinate their efforts and minimize their fees and expenses through a single trial, thereby permitting them to maximize the recoveries available to their clients; (3) ensure that insurance proceeds available to deserving victims would not be depleted by the costs and attorneys' fees incurred by defendants in repeated trials in multiple federal and state jurisdictions; (4) eliminate the risk that punitive damages would be imposed in an inconsistent manner or repeatedly assessed against the same defendant; (5) eliminate the possibility of inconsistent adjudications on common liability issues; and (6) conserve the already overtaxed resources of state and federal courts by avoiding multiple and repeated trials before different courts on the same common issues. Again, I emphasize the beneficial effect on settlements arising from the parties' early knowledge of when and before whom trial would occur.

As a practical matter, litigants in centralized mass disaster cases have themselves frequently recognized the desirability of single trials of common issues. Often, in the past, transferee judge decisions to consolidate trials on the issue of liability were made upon the joint request of plaintiffs and defendants.

A couple of examples will serve to illustrate the difficulties in mass accident cases. Judge William L. Standish (Western District of Pennsylvania) was the transferee judge in the Judicial Panel's group of centralized cases arising from the USAir (now USAirways) crash near Pittsburgh, Pennsylvania, on September 8, 1994, that resulted in the death of 132 passengers and crew members. In addition to the federal actions centralized before him by the Judicial Panel for pretrial proceedings, 22 other actions were pending in the Cook County, Illinois Circuit Court. These actions were not removable to federal court at that time or otherwise transferable by the Judicial Panel because an individual resident of Illinois was joined as a defendant in each of those cases, thereby destroying complete diversity between plaintiffs and defendants in the cases.

Judge Standish wrote in a letter in 1999 as follows:

> Because the Cook County cases remained in the Illinois state court, there has been considerable duplication of work by the attorneys involved, some of whom represent parties in both jurisdictions. Two steering committees for plaintiffs were appointed; attorneys have attended conferences, arguments and hearings in both Pittsburgh and Chicago and both courts have been required to rule on various discovery and other issues, sometimes inconsistently, despite the fact that the judges involved communicated extensively with each other and, at times, had joint hearings or arguments on discovery motions. The inconsistent rulings, for the most part, resulted from differences in the Federal and Illinois Rules of Civil Procedure relating to discovery, but they have caused inconvenience, additional expenses and the expenditure of additional time by the attorneys in the conduct of discovery.
>
> When discovery concludes, in the near future, motions for summary judgment may be filed in both courts by the same parties, and it is possible that

rulings on these motions may differ.

Another judge, former Judicial Panel member Louis C. Bechtle of the Eastern District of Pennsylvania, has commented on how trial-transfer authority might have helped him in his role as a settlement judge in the multidistrict litigation action arising out of the fire disaster that took 97 lives and injured hundreds more at the Dupont Plaza Hotel in San Juan, Puerto Rico, on New Year's Eve, 1986. He wrote in a 1999 letter as follows:

> Citizens of Puerto Rico could not become parties to this MDL litigation because of a lack of diversity with the principal defendants. This was especially unfortunate because Puerto Rico does not provide for jury trials in such cases. The result was that the claimants who could not be in the federal MDL litigation would not have the full benefit of the federal discovery, and other processes related to a jury trial, yet those citizens were the victims of the same catastrophe as those who were citizens of states other than Puerto Rico and whose cases were being administered in the MDL. Under the new legislation those persons could intervene in the MDL proceedings and fully participate in all phases of the litigation including the settlement course, on the same basis as other claimants. Also because of the proposed removal provisions, the defendants could defend in one forum at one time and under the same standards. Considerable financial and professional resources of all parties and the state, territorial, and local governments would have been achieved had the proposed legislation been in place at that time.
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> I would also add that in my conversations with . . . citizens of Puerto Rico regarding the Dupont Plaza fire, nearly all would have preferred to be included in the MDL for the pre-trial proceedings including full discovery and ultimate disposition.

Although Congress responded in part by enacting the Multiparty, Multiforum law in 2002 to address the centralization of state and federal cases arising from a single accident, it failed to provide the remaining critical component of providing self-trial transfer authority as was intended.

I want to further emphasize here that when state cases such as these are tried in their

respective jurisdictions, a myriad of additional costs and duplications arise as a result of trial of the same liability issues in both state and federal court. Ultimately, it must be remembered that the plaintiffs' lawyers and the defendants' lawyers always receive payment in full for their services. It is rather the parties on both sides who pay the price for the system's deficiencies. Defendants, and their insurance companies, expend vast sums relitigating the same issues in forum after forum. And the victims of these horrible tragedies and/or their survivors, whose lives have already been touched by unfathomable sorrow, suffer the final indignity of seeing sums that would be used to reimburse medical expenses or other losses consumed by unnecessary transactional costs.

Conclusion

The Judicial Conference of the United States urges the Senate to pass the Multidistrict Litigation Restoration Act, which has already passed the House of Representatives during the 109th Congress as H.R. 1038. In cases that have been centralized by the Judicial Panel, this legislation will give the transferee judge and the litigants the desirable option of transferring a case to the transferee judge for trial purposes, as was often done for 30 years until the Supreme Court's *Lexecon* holding in 1998. The operative language of the Multidistrict Litigation Restoration Act is well-suited for judges and litigants to use and apply as needed, based on the circumstance of each case that is centralized. Enactment of such legislation will truly benefit both plaintiffs and defendants who will both gain substantial savings of time and money.

Thank you again, Mr. Chairman, for the opportunity to testify on behalf of the Judicial

Conference in support of this important and necessary legislation. I would be pleased to answer any questions you or the other members of the Subcommittee may have.

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Attachment

Observations by 27 Federal Transferee Judges Since 1998
Depicting Their Frustration with the Absence of Self-Transfer Authority for Trial

• **Judge John Feikens**, E.D. Michigan, *Air Crash near Monroe, Michigan, on 1/7/97*:
Prior to *Lexecon*, all parties had agreed for him to preside over a joint liability trial. Thereafter, he planned to proceed with trial for the two non-settling cases that were originally filed in E.D. Michigan. Although he recommended that the Judicial Panel remand five other cases to their transferor courts and that those courts under § 1404 return the cases to him for trial, that suggestion was not followed and the prospect of multiple trials ensued.

• **Judge Robert W. Sweet**, S.D. New York, *NASDAQ Market-Maker Antitrust Litigation; Air Crash off Long Island, New York, on 7/17/96 (TWA Flight 800)*:
The litigation raised complicated issues regarding how to try majority of cases transferred to him from elsewhere. Also, absent an interlocutory appeal to the Second Circuit, the parties and numerous district courts throughout the U.S. would face protracted litigation over the applicability of the Death on the High Seas Act. *Lexecon* has substantially eviscerated the practical purposes of MDL assignments. After all, pretrial simply sets the stage for ultimate resolution. In order to achieve the benefits of centralized pretrial, the assigned judge should have the ability to conduct a consolidated trial on liability. Such a power would greatly enhance the possibility of settlement and, most importantly, eliminate the threat of inconsistent determinations throughout the country.

• **Judge Manuel L. Real**, C.D. California, *Baxter Healthcare Corp. Gammagard Products Liability Litigation; Motorcar Parts and Accessories, Inc., Securities Litigation*:
Lexecon will slow the disposition process of MDL cases. Return to transferor districts before some case or cases can be tried will abort settlement of the entire litigation. *Lexecon* could present a problem for getting bellwether cases for the various subclasses or for damages.

• **Judge Edmund V. Ludwig**, E.D. Pennsylvania, *Latex Gloves Products Liability Litigation*:
Plaintiffs' lead counsel endorsed trial in the MDL transferee district, although transferor courts would have to use § 1404 to return § 1407 remanded cases to the MDL transferee district for trial. *Lexecon* makes a global resolution much more difficult, as lawyers recognize.

• **Judge Alfred V. Covello**, D. Connecticut, *Air Crash at Dubrovnik, Croatia, on 4/3/96 (involving Commerce Secretary Ron Brown)*:
Legislation to permit self-transfer will provide more judicially efficient administration of MDLs. Because of *Lexecon*, increased transactional costs for the litigants and the court have resulted, as evidenced not only in my MDL, but also by remand of breast implant cases to me in another MDL in which I had no previous interaction because I was the transferor judge rather than the transferee judge.

• **Judge John E. Sprizzo**, S.D. New York, *Bennett Funding Group, Inc., Securities Litigation*:
Lexecon will severely complicate the resolution of this litigation in which a number of state and federal law claims are pending and which, after *Lexecon,* will have to be returned to a multitude of courts for trial.

• **Judge Sarah S. Vance**, E.D. Louisiana, *Ford Vehicle Paint Litigation*:
Hopefully, pending legislation will be passed to overrule *Lexecon,* thereby streamlining multidistrict litigation.

• **Judge Jerome B. Simandle**, D. New Jersey, *Ford Ignition Switch Products Liability Litigation*:
Plaintiffs' counsel were divided – some wanted remand to state courts, others wanted to wait and see what happens with bellwether trial. Defense counsel were critical of *Lexecon* and would like to see the statute changed.

• **Judge Maurice M. Paul**, N.D. Florida, *Commercial Tissue Products Antitrust Litigation*:
Lexecon legislation that would allow transferee judges to retain cases through disposition would save judicial time and resources.

• **Judge Joe Kendall**, N.D. Texas, *Great Southern Life Insurance Co. Sales Practices Litigation*:
Rather than docket each case event in a master docket, he decided to docket such events in each individual case, even though more laborious, to facilitate eventual remand.

• **Judge Charles L. Brieant**, S.D. New York, *Oxford Health Plans, Inc., Securities Litigation; High Pressure Laminate Antitrust Litigation*:
Hopes for a legislative solution of the *Lexecon* problem.

• **Judge U.W. Clemon**, N.D. Alabama, *Non-Filing Insurance Fee Litigation*:
Lexecon is an impediment to settlement.

• **Judge David F. Hamilton**, S.D. Indiana, *AT&T Fiber Optic Cable Installation Litigation*:
This would be a great case for self-transfer if legislation would allow it. The merits of the claims turn on issues of property law and the interpretation of deeds, easements, and the like. Determining damages and administering individual property owners' claims present a prospect I would hate to have to transfer back to anyone else.

• **Judge Roderick R. McKelvie**, D. Delaware, *Manchak Patent Litigation; Reliance Acceptance Group, Inc., Securities Litigation*:
The litigants should be working toward an early and firm trial date, which I could provide but for *Lexecon*.

• **Judge Barbara S. Jones**, S.D. New York, *Omeprazole Patent Litigation*:
Remand motions consumed considerable amounts of this court's time and effort which were duplicative of similar efforts made by the transferor courts to transfer cases back for trial.

• **Judge Stewart Dalzell**, E.D. Pennsylvania, *Rite Aid Corp. Securities Litigation*:
Remand of non-Pennsylvania cases back to the transferor forum creates serious risk of conflicting adjudications.

• **Judge Thomas W. Thrash, Jr.**, N.D. Georgia, *Dippin' Dots Patent Litigation*:
This case is a prime example of the inefficiency and problems caused by the unfortunate *Lexecon* decision. Needless to say, resolution of this case has been prolonged and involved greater expense to the judiciary (and some hardship for me and my staff) because of my inability to transfer the Northern District of Texas case to myself for trial here in the Northern District of Georgia. On the other hand, it would have been almost criminal to dump this case on a new Northern District of Texas judge for trial. The MDL docket in this district has 427 docket entries. The Northern District of Texas case docket has 931 entries. I hope this problem is fixed by Congress soon.

• **Judge Lewis A. Kaplan**, S.D. New York, *Rezulin Products Liability Litigation*:
A transferee court ought to have the right, on its own initiative or on motion, to transfer a case to the transferee court for trial.

• **Judge Kathleen McDonald O'Malley**, N.D. Ohio, *Commercial Money Center, Inc., Equipment Lease Litigation; Sulzer Hip and Knee Prostheses Products Liability Litigation*:
At the heart of the equipment lease litigation is a dispute over the validity of a series of nearly identical leases and the enforceability of surety agreements and insurance policies relating to those leases. This court has original jurisdiction over actions relating almost exclusively to the enforceability of the surety agreements. Trying those actions without the authority to try the closely-related question of the validity of the insurance agreements and the possibly threshold question of the validity of the underlying leases would prove extremely inefficient from a judicial resources standpoint. In the prostheses litigation several of the lawyers indicated a belief that *Lexecon* interferes with a transferee judge's ability to broker a meaningful resolution of coordinated cases where there are a high volume of claimants.

• **Judge Thomas F. Hogan**, D. District of Columbia, *Vitamins Antitrust Litigation*:
The court has to refer many cases back for further litigation which will substantially delay resolution of the cases where circuit law may be different and as parties have to educate new judges about the largest price-fixing case in history. This is a tremendous waste of resources. Further, it seems that some cases have not settled because certain parties wish to proceed in different jurisdictions.

• **Judge Eldon E. Fallon**, E.D. Louisiana, *Propulsid Products Liability Litigation*:
The rule of *Lexecon* and its effect have been considered in the context of a motion to enjoin all parallel state court proceedings and in addressing a motion for certification of a nationwide class action for medical monitoring pursuant to Federal Rule of Civil Procedure 23(b)(6). Specifically, this court has considered the limitations which *Lexecon* places on the use of consolidated master complaints in MDL proceedings.

• **Judge Nancy G. Edmunds**, E.D. Michigan, *Cardizem CD Antitrust Litigation*:
Lexecon was raised in the context of defendants' motion for interlocutory appeal, with defense counsel arguing that without an immediate appeal there was the possibility of numerous contradictory results if forced to wait for a final judgment by the transferor courts. It was also raised during discussion of scheduling and structuring of trials in the MDL action. Trial on the individual Sherman Act plaintiffs' action had to be delayed while a suggestion of remand was pending. Plaintiffs had indicated that they would file a motion seeking transfer back to this court after remand, and defendant indicated that it would oppose any such transfer. Two hotly contested issues were certified for interlocutory appeal. If these legal issues had not been resolved before cases were transferred back to the transferor court, post-trial appeals in various courts of appeal could have rendered moot a considerable amount of the consolidated pretrial proceedings undertaken in the transferee court. Thus, the *Lexecon* decision has the potential for wasting judicial resources and increasing the overall costs of litigation. That potential was further evidenced by this court's need to delay trial on the remaining consolidated litigation because a suggestion of remand had to be prepared for one of the consolidated actions.

• **Judge Barbara J. Rothstein**, W.D. Washington, *Phenylpropanolamine (PPA) Products Liability Litigation*:
Of concern arising from the *Lexecon* decision is that *Lexecon* prevents the court from setting the vast majority of cases in this MDL for trial.

• **Judge David D. Dowd, Jr.**, N.D. Ohio, *Capital Consultants, LLC, ERISA Litigation*:
He had planned to resolve all of the cases, even if it meant conducting trials. However, he is required to remand the cases once the pretrial proceedings are complete.

• **Judge Barefoot Sanders**, N.D. Texas, *Southwestern Life Insurance Co. Sales Practices Litigation*:
Because of *Lexecon*, the court is obviously unable to provide a firm trial setting. With a firm trial setting the court believes the pending cases will settle. For that reason the court will likely file a suggestion of remand with respect to these cases.

• **Judge James T. Giles**, E.D. Pennsylvania, *Air Crash near Peggy's Cove, Nova Scotia, on 9/2/98*:
Counsel for plaintiffs suggested early on that a bellwether trial might be helpful for settlement strategies.

• **Judge Federico A. Moreno**, S.D. Florida, *Managed Health Care Litigation*:
Certain defendants objected to trial setting, even though the court announced its availability for trial.